(2)

No. 10-1036

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 23 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELORES A. ZARNOW, Independent Administratrix for the Estate of Dr. Allen J. Zarnow, Deceased,

Petitioner,

CITY OF WICHITA FALLS, TEXAS; CHIEF OF POLICE KEN COUGHLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JULIA M. VASQUEZ
CITY OF WICHITA FALLS
1300 7th Street
Wichita Falls, Texas 76301
(940) 761-7625

D. D'LYN DAVISON
Counsel of Record
DAVISON RUGELEY, L.L.P.
900 Eighth Street, Suite 1102
Wichita Falls, Texas 76307-0099
(940) 766-1388
dlyndavison@sbcglobal.net

Counsel for Respondents

May 23, 2011

236310

COUNSEL PRESS
(800) [illegible]-8321 • (800) 359-6859

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Whether Petitioner presented a compelling reason to grant the Petition when the Fifth Circuit applied the well established law of the case doctrine affirming the District Court's exercise of its discretion to permit a second motion for summary judgment filed at the request of all the parties, after notice, and an opportunity to fully brief and present evidence on the issue of municipal liability, despite an earlier interlocutory order denying summary judgment?

2. Whether the Petitioner has presented a compelling reason to grant the Petition, when the Fifth Circuit applied well established municipal liability principles and affirmed the District Court's decision that no unconstitutional municipal conduct occurred without evidence of specific incidences or the implementation of a widespread practice predating the events at issue?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS TO DENY PETITION	4
I. No Conflict in Authority Between the Circuits or Undecided Federal Question Exists	4
II. Law of the Case is a Discretionary Doctrine Not a Limitation of a Court's Power Over its Own Rulings	6
A. The Orders Were the District Court's Own Interlocutory Decisions on Separate Submissions	7
B. Petitioner Had Notice and Had Responded Before Consideration of Second Motion by District Court	8
C. District Court's Decision To Consider Second Summary Judgment is Reviewed for Abuse of Discretion	11

Table of Contents

	Page
III. The Courts' Rulings Requiring Proof of a Pattern for "Municipal Action" are Consistent with this Court's Authority	14
IV. Rule 15(3) Perceived Misstatement of Fact or Law	22
CONCLUSION	22

TABLE OF CITED AUTHORITIES

Page

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 21

Alpha/Omega Ins. Serv., Inc. v. Prudential Ins. Co. of America,
272 F.3d 276 (5th Cir. 2001), *and reh'g. denied* .. 12

Arizona v. California,
460 U.S. 605 (1983) 7

Bd of Comm'rs of Bryan County v. Brown,
520 U.S. 397 (1997) 16, 20

Bennett v. City of Slidell,
728 F.2d 762 (5th Cir. 1984), *reh'g. denied*,
735 F.2d 861, *cert. denied*, 472 U.S. 1016
(1985)..... 21

Bethlehem Steel Export Corp. v. Redondo Construction Corp.,
140 F.3d 319 (1st Cir. 1998) 8

Christianson v. Colt Industries Operating Corp.,
486 U.S. 800 (1988) 7

City of Canton v. Harris,
489 U.S. 378 (1989) 16, 20

City of Conrod v. David,
120 F.3d 92 (8th Cir. 1997), *cert. denied*,
523 U.S. 1081 (1998) 12-13

Cited Authorities

Page

City of St. Louis v. Praprotnik,
485 U.S. 112 (1988) 21

Connick v. Thompson,
131 S.Ct. 1350, 179 L.Ed.2d 417,
2011 U.S. Lexis 2594 (2011) 6, 21

Daniels v. McKay,
607 F.2d 771 (7th Cir. 1979) 8

Dictograph Products Co. v. Sonotone Corp.,
230 F.2d 131 (2nd Cir. 1956), *and reh'g denied*,
231 F.2d 867 (1956) 8

Loumar, Inc. v. Smith,
698 F.2d 759 (5th Cir. 1983) 12

Mann v.
Merrill-Lynch, Pierce, Fenner & Smith, Inc.,
488 F.2d 75 (5th Cir. 1973) 12

Messenger v. Anderson,
225 U.S. 436 (1912) 7

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 16, 20

Mosley v. City of Northwoods,
415 F.3d 908 (8th Cir. 2005) 8, 12

Cited Authorities

Page

Snyder v. Trepagnier,
142 F.3d 791 (5th Cir. 1998), *and reh'g denied*,
149 F.3d 1181, *cert. denied* 526 U.S. 1083..... 20

United States v. Pepper,
131 S.Ct. 1229 (2011)..... 5-6, 7, 8

Webster v. City of Houston,
735 F.2d 838 (5th Cir. 1984)..... 20

Zarnow v. City of Wichita Falls,
500 F.3d. 401 (5th Cir. 2007) 9, 12

STATUTES

U.S. Const. amend. II..... 2

U.S. Const. amend. IV 2, 4, 14

U.S. Const. amend. V 2

U.S. Const. amend. VI 2

U.S. Const. amend. XIV..... 2

42 U.S.C. § 1983..... 1

Sup. Ct. R. 10..... 5

STATEMENT OF THE CASE

The Fifth Circuit's August 9, 2010 decision dismissing Petitioner's 42 U.S.C. §1983 municipal liability claim rested on: (1) the application of familiar municipal liability concepts and the lack of evidence of any unconstitutional conduct by the municipality, (PET. APP. 12a); (2) the application of familiar procedural principles and evidentiary burdens in a summary judgment context and the waiver of arguments by the Petitioner at the district court and appellate court levels, (PET. APP. 14a); and (3) the widely accepted and established precedent that the law of the case is a doctrine of discretion and interlocutory rulings are subject to change by the district court. (PET. APP. 17a).

The rare factual situation addressed in this case arose when a city's police force responded to a clinic's report of possible explosives on site that eventually led to the discovery of a doctor's possession of explosive materials, a cache of automatic weapons, large amounts of cash, numerous weapons and thousands of rounds of ammunition. Dr. Allen Zarnow originally brought suit under 42 U.S.C. §1983 and the Texas Constitution claiming that his rights were violated after local and federal fire and law enforcement and military personnel responded to a report of explosive materials in his office at a local medical clinic. This initial reporting and the follow up investigation culminated in the issuance of several warrants, several searches and specific seizures of Zarnow's property which the district court and the Fifth Circuit found did not constitute unconstitutional "municipal" action. (PET. APP. 16a).

Zarnow sued eight identified, as well as other unidentified, police officers, along with the City of Wichita Falls and its Police Chief Kenneth Coughlin, in his official capacity, claiming constitutional deprivations of rights through the Second, Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and state law violations. All parties moved for summary judgment and the City and officers also moved to dismiss on the pleadings. Petitioner Zarnow[1] dismissed and abandoned numerous claims throughout the proceeding, including all state claims. The district court analyzed and initially dismissed all remaining claims except for the Fourth Amendment allegations. The district court then dismissed some but not all officers, and, following the individual officers' successful appeal of the denial of qualified immunity, dismissed all of the individuals, leaving only the claims against the municipality.

After the qualified immunity appeal and dismissal of the individuals, the district court permitted all parties to file a second summary judgment motion addressing the facts and focusing on the requirements for municipal liability. Following notice, and with motions, responses and replies submitted by all parties (PET. APP. 20a), the district court granted summary judgment on the City's motion that there was no unconstitutional municipal policy or custom, and dismissed the Petitioner's claim that the City's actions had created any basis for liability. (PET. APP. 38a-39a).

---

1. Allen Zarnow died in 2006 and his representative, Delores Zarnow, has been substituted as the party Plaintiff. R9: 2198, and is the Petitioner.

The district court concluded that Petitioner had no evidence of any express unconstitutional policy adopted or promulgated by the City's official policymakers and no evidence establishing a persistent pattern of unconstitutional conduct sufficient to demonstrate a custom of the City. (PET. APP. 38a). All of Petitioner's evidence presented to the trial court focused on the actions of the officers in this one incident. (PET. APP. 36a). Zarnow did not present evidence in response to the summary judgment that raised even one other specific instance of another claimed unconstitutional search or evidence of any specific instance in which the misuse of the plain view doctrine resulted in another claimed constitutional violation. (PET. APP. 38a). Although Zarnow responded to the City's motion, the district court determined that the response failed to raise a fact issue on the claims of unconstitutional conduct through any custom or policy attributable to the City. (PET. APP. 38a). The district court granted summary judgment in favor of the City and the Police Chief in his official capacity. (PET. APP. 39a).

On appeal, the Fifth Circuit determined that the district court correctly concluded that there was no evidence establishing a persistent pattern of unconstitutional conduct sufficient to establish a municipal custom, as "improbable inferences" and "unsupported speculation" are not proper summary judgment evidence. (PET. APP. 12a). Finding that Petitioner failed to meet her burden to introduce evidence to support any claim of inadequate training, (PET. APP. 16a), and waived any theory of single instance policymaker action by failing to timely present it to the district court or to the appellate court (PET. APP. 14a), the Fifth Circuit ultimately rejected the Petitioner's attempt at municipal liability. Without evidence raising

any other incident of specific unconstitutional conduct, or a pattern of unconstitutional conduct occurring for so long and with such frequency as to constitute a custom of the City, the Fifth Circuit refused to find municipal liability. (PET. APP. 12a). It affirmed the district court's finding that there was no proof sufficient to raise a fact issue on any asserted violation of Zarnow's Fourth Amendment rights by the City's actions (PET. APP. 16a), as opposed to the individual action of its officers.

The Fifth Circuit rejected Petitioner's assertion that the law of the case doctrine restricted the district court's power to grant a separate summary judgment motion filed after notice to all parties with an opportunity to respond, even though the Court had, by its earlier interlocutory order, previously denied an earlier summary judgment motion. (PET. APP. 17a).

It is from the final order granting summary judgment in favor of the City, and the Fifth Circuit opinion supporting that dismissal, that this petition seeks review.

REASONS TO DENY PETITION

I. NO CONFLICT IN AUTHORITY BETWEEN THE CIRCUITS OR UNDECIDED FEDERAL QUESTION EXISTS.

Petitioner has sought review of the decisions below by relying on the discretionary doctrine known as the law of the case and by relying on a claimed misapplication of the requirements for municipal liability to these specific facts. The decisions below do not conflict with a decision of this Court or any Court of Appeals. The basis for dismissal

does not raise an important federal question undecided by this Court. Respondents oppose this review as Petitioner does not set forth, nor are there, any compelling reasons for the grant of the Petition or the exercise of this Court's limited resources.[2] See Sup. Ct. R. 10.

Petitioner makes a feeble attempt to claim that there is a circuit split and important federal question concerning the Fifth Circuit's refusal to find that the law of the case doctrine applied to limit the power of the district court to consider its own prior interlocutory rulings. This question – whether the law of the case doctrine applies to interlocutory decisions made by the same district court, (i.e., whether the denial of summary judgment by a district court precludes its later decision to grant a second summary judgment in a totally separate subsequent submission) – is one that the Courts agree is a matter of a court's discretion, not of its power. Petitioner misrepresented the procedural history in the case claiming she had no notice of the motions' consideration, when the record establishes she was given notice and an opportunity to respond to the summary judgment motion and, in fact, actually responded to the motion. (PET. APP. 20a). Respondents submit that this Court should refuse the Petitioner's request, which is based on an unsubstantiated conflict in authority or claim of federal importance and on a misrepresented record. This requested review based on the law of the case doctrine is not supported by this Court's reasoning in the recent case of *United States v.*

2. The City disagrees with the policymaker determination reached in the decision below, but recognizes the limiting language of the opinion "to these facts" and the summary judgment posture of the case, which effectively precludes any appropriate basis for a challenge requesting this Court's review of that limited decision.

Pepper, 131 S.Ct. 1229, 1250-51, 179 L.Ed.2d 196, 2011 U.S. Lexis 1902 (2011).

Petitioner's second request for review also glosses over any requirement to demonstrate a compelling reason for this Court's consideration of the Petition. She claims an important federal question is presented but then simply argues that the Fifth Circuit failed to properly apply existing applicable law on municipal liability. The Fifth Circuit properly rejected Petitioner's attempt to use unsupported inferences and speculation as evidence to establish a policy or to consider individual actions in one incident as evidence of a custom. The Petition fails to demonstrate a compelling reason for review as Petitioner had no evidence of the municipality's unconstitutional conduct. This requested review of municipal liability should be foreclosed by this Court's reasoning in the recent case of *Connick v. Thompson*, 131 S.Ct. 1350, 1360-61,179 L.Ed.2d 417, 2011 U.S. Lexis 2594 (2011).

In essence, the Petition merely requests this Court to act as an additional tier of review for one district court's exercise of its decision making discretion over its own orders in permitting and granting a second summary judgment motion on a municipal liability claim.

II. LAW OF THE CASE IS A DISCRETIONARY DOCTRINE NOT A LIMITATION OF A COURT'S POWER OVER ITS OWN RULINGS.

Petitioner requests that this Court review the Fifth Circuit's refusal to use the law of the case doctrine to limit the district court's power, upon summary judgment submission, to dismiss her claim. (PET. APP. 8). At the heart of her argument is the contention, which is unsupported

in the record, that she was prejudiced by the lower court's consideration, without notice, of a second motion for summary judgment by the City. (PET. APP.8). This Court should deny the Petition for Certiorari because:

(1) The law of the case is a doctrine of discretion that does not apply to prevent a district court from properly exercising its power to consider and alter its interlocutory decisions and dismiss a claim when no evidence supports it; and

(2) Zarnow had notice of the district court's intention to consider, and an opportunity to respond to, any motion filed by the City prior to the court's decision. Petitioner's claim of "no notice" misrepresents the undisputed facts and procedural history as she was aware that a summary judgment motion could, and would, be filed by the City and, in fact, a response was filed to the motion.

A. The Orders Were the District Court's Own Interlocutory Decisions on Separate Submissions.

The law of the case is a doctrine of judicial discretion rather than a limitation of judicial power when a court reviews its own decisions. *See, e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) relying on *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). In the last three months, this Court has confirmed that the law of the case doctrine is one that "directs a court's discretion," not one that operates to "limit the tribunal's power." *United States v. Pepper*, 131 S.Ct. at 1250-51, citing *Arizona v. California*, 460 U.S. 605, 618 (1983).

In *Pepper*, the Court briefly discussed the reasoning supporting the amorphous discretionary doctrine but refused to apply the law of the case to hold that a prior decision which considered the evidence of various factors presented to the Court at the time of one sentencing should control a subsequent sentencing decision which was presented and decided at a later time. *United States v. Pepper*, 131 S.Ct. at1250-51. The same logic should apply to summary judgment decisions on separate motion submissions presented at two different times.

Petitioner misrepresents that there is a split in the circuits when the Courts of Appeal agree that an interlocutory order, i.e., the denial of a motion for summary judgment, remains open to change by the district court and its consideration is not precluded by the law of the case doctrine. *Bethlehem Steel Export Corp. v. Redondo Construction Corp.*, 140 F.3d 319, 321 (1st Cir. 1998); *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2D 131, 134-36 (2nd Cir. 1956) and reh'g denied, 231 F.2d 867 (1956); *Daniels v. McKay*, 607 F.2d 771, 773-774 (7th Cir. 1979); and *Moseley v. City of Northwoods*, 415 F.3d 908 (8th Cir. 2005).

B. Petitioner Had Notice and Had Responded Before Consideration of Second Motion by District Court.

To avoid the widely accepted rule that a court retains the power to change its own interlocutory rulings, the Petitioner cites district court decisions, thrown in with circuit court authorities that do not conflict with the rulings below, in the hope of constructing an escape hatch. Petitioner complains of the district court's consideration

of a second motion for summary judgment by the City, inaccurately representing the record by claiming that this consideration was without prior notice to her. The Petition incorrectly states the district court "inexplicably and without notice reversed its own opinion" (PET. 15) and "prejudiced Zarnow greatly in failing to even give the opportunity to present evidence or argument on the issues ...." (PET. 16). Her challenge lacks merit because she not only received notice of the court's intent to permit the motion, she responded to the motion before the court considered it.

Petitioner has misrepresented the history related to the district court's consideration of the second motion as the record shows that in ruling, the district court considered motions and extensive responses and replies and appendices. (PET. APP. 20a). Following an appeal that (a) reversed the district court's decision denying qualified immunity for the individuals and (b) dismissed any requested review on appeal by the City because of a lack of jurisdiction, *Zarnow v. City of Wichita Falls*, 500 F.3d. 401, 406-407, 409-411 (5th Cir. 2007), the district court conducted status conferences for disposition of the causes remaining after appeal. R10: 2269, 2272. The district court also ordered the parties to file a report indicating the matters remaining for decision. R10: 2269, 2272. In the report, Petitioner requested the court permit additional summary judgment filings and requested a hearing on whether the parties should be granted leave to file dispositive motions. R10: 2301-2312, 2303-2304, 2309. SRE: 4. The court agreed but established additional pretrial deadlines for ***all parties*** to file motions and on June 4, 2008, ordered that "**Plaintiff and Defendants** shall be permitted to file dispositive motions (motions to

dismiss/summary judgment) (total or partial) ..." R10: 2315. SRE: 5.

Petitioner knew of the deadline contained in the order because on July 2, 2008, and July 30, 2008, the court ordered by *agreement of the parties*, an extension of the date for submission of dispositive motions. R10: 2322, 2414. SRE: 6, 7. The court set a deadline for responses to dispositive motions, R13: 3185, which was also extended by agreement of the parties. R13: 3187, 3189-3194; R14: 3257, 3259. The court specified a date for filing replies to the responses to dispositive motions and that deadline was also extended by agreement of the parties. R13: 3185; R14: 3476, 3478 and 3486. The district court's orders and Petitioner's agreements demonstrate her knowledge of the need to respond to the City's motion and her misrepresentation of the record before this Court.

Petitioner's claim of prejudice because the court gave no notice that it would consider a second summary judgment motion of the City is unfounded. The very issues raised by the City's summary judgment motion are outlined in the joint report filed with the district court. R10: 2301-2312. More than four months before filing her response, Petitioner knew that the district court was permitting *all parties* to submit new summary judgment motions and responses. In fact, Petitioner filed a response to the City's second motion and never objected to the district court's consideration of the second motion before it was granted. R13: 3195 -R14: 3256. Petitioner not only knew that responses were necessary but knew the specific content of the City's arguments that needed response as early as August 13, 2008. R10: 2469.

Only after the court granted the City's motion and dismissed Petitioner's claim, did she contend that the court's previous denial of a summary judgment motion should fall within the law of the case doctrine to bar the court's consideration of the second motion for summary judgment. Her requested review in this Petition based on prejudice related to the second summary judgment submission finds no support in the facts.

C. District Court's Decision To Consider Second Summary Judgment is Reviewed for Abuse of Discretion.

Having notice that the second motions would be considered, Petitioner's law of the case argument is reduced to whether the district court, having once denied a summary judgment, abused its discretion by granting a separate summary judgment motion even when there is a lack of evidence supporting any continued claim for liability.

Petitioner claims no new evidence was introduced in the second round of motion submissions. (PET. 15). This is a misrepresentation of the record as additional evidence of instances in which the City Council exercised its authority over the Police Chief and Police Department were provided in the submissions. R14: 3340-3369. SRE: 10.

Petitioner's contention that the prior motion denial should prohibit dismissal because the City failed to file a motion for reconsideration or alteration lacks merit. The district court initially found that there was a fact issue as to whether Coughlin was a policymaker for the City (a clearly erroneous finding as this presents a

question of law, not fact) which could not be reviewed in the first appeal because of the lack of a final order. *See*, *Zarnow v. City of Wichita Falls*, 500 F.3d at 406. Denial of a summary judgment motion is not ordinarily a final appealable order. The Fifth Circuit did not review the merits of that decision on appeal, it simply dismissed for lack of jurisdiction. *Zarnow v. City of Wichita Falls*, 500 F.3d at 406-407. A dismissal for lack of jurisdiction does not review the underlying ruling. *Mann v. Merrill-Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75, 76 (5th Cir. 1973).

To accept Petitioner's position would dictate that once the court denied one motion for summary judgment, it must always deny all summary judgment motions. The law of the case "is a rule of convenience and utility and yields to adequate reason, for the predecessor judge could always have reconsidered his initial decision so long as the case remained in his court." *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983). To utilize the law of the case doctrine Petitioner should be required to demonstrate that when the court denied the City's motion, the issue of the City's liability was actually decided. The law of the case should not apply to a court's *denial* of a summary judgment motion because it is not an order which carries forward a decision on the merits. The case law provides no support for that position, as illustrated by the case of *Alpha/Omega Ins. Serv., Inc. v. Prudential Ins. Co. of America*, 272 F.3d 276, 283 (5th Cir. 2001) and reh'g denied, and *Mosley v. City of Northwoods*, 415 F.3d at 911. (Grant of City's second motion for summary judgment upheld despite denial of prior motion). The law of the case doctrine does not deprive a district court of its ability to reconsider its own rulings. *City of Conrod v. David*, 120

F.3d 92, 95 (8th Cir. 1997), cert. denied, 523 U.S. 1081 (1998).

Summary judgment motions are a procedure designed for judicial economy and efficiency. The law of the case is a practical rule of judicial discretion also designed for judicial economy and efficiency. Should this Court determine that the prior denial of a motion for summary judgment invokes the law of the case doctrine, the City contends that the court properly exercised its discretion permitting a second summary judgment consideration because:

(1) it is more judicially efficient to reconsider the City's judgment entitlement applying the proper requirements to a municipal liability claim than to require a trial when no fact issue as to the City's liability exists.

(2) the number of parties and claims addressed in the first round of dispositive motions made it too difficult to isolate and focus on the specific requirements for municipal liability analysis.

The district court properly exercised its discretion considering the nature of the proceedings and the case context. In this case context, there was no final determination by the lower court nor appellate review of that determination as it relates to the City's first summary judgment motion to implicate the law of the case. No basis exists to reverse the analysis of the Fifth Circuit or the district court's subsequent consideration and dismissal of the unsupported municipal claim.

III. THE COURTS' RULINGS REQUIRING PROOF OF A PATTERN FOR "MUNICIPAL ACTION" ARE CONSISTENT WITH THIS COURT'S AUTHORITY.

This Court should deny the Petition for Certiorari because the United States Court of Appeals for the Fifth Circuit and the district court correctly determined that the Petitioner's "evidence" did not reveal any unconstitutional policy or custom of the City, the application of which resulted in harm to Zarnow.

Petitioner claims that the City has an unwritten municipal custom of warrantless seizures in violation of the Fourth Amendment. The specific facts in this case reveal that five separate warrants were secured by officers, not that warrantless searches were being conducted. The entire theory of municipal liability advanced by Petitioner rests on what the Fifth Circuit properly characterizes as "improbable inferences" and "unsupported conclusions." Petitioner admittedly has no evidence of any formal, written policy which she alleges caused her unconstitutional harm. Simply put, Petitioner wants this Court to disregard its own decisions and long standing precedent to find that she can establish the existence of an unconstitutional "custom" without having *any* evidence that the actions complained of were widespread or occurred with regularity. Zarnow admittedly has no evidence of other specific incidents where officers of the Wichita Falls Police Department impermissibly seized items because of the intentional misapplication of the "plain view" doctrine. Zarnow attempts to promote the novel theory that because he presented "evidence and direct testimony" of a custom,

that a "pattern" is not required (PET. BRIEF 18-19). While admitting that "many incidents" would be required to prove the existence of a "custom"; Zarnow inconsistently asserts that "where the policy is proved by Defendants, proof of incidents involving other citizens is unnecessary." *Id.*

Petitioner's claim that she presented "uncontroverted proof that Police Chief Coughlin testified to the procedure employed by the City of Wichita Falls when seizing property that is not listed in a search warrant" is a misrepresentation of the evidence. Coughlin did not testify as to *any* specific procedure that was "employed by the City" or utilized by the officers of the Wichita Falls Police Department in each and every search and seizure, including those searches that were conducted before, during and after the Zarnow searches. Additionally, Petitioner's claim that she "presented uncontroverted testimony of other veteran officers of the Wichita Falls Police Department who echoed that same procedure," is equally misrepresentative of the record. Petitioner presented NO evidence whatsoever to the district court or the Court of Appeals that Chief Coughlin formulated any specific procedure that was communicated to the officers directing them how to conduct searches and what evidence to seize during those searches. Nor is there ANY evidence that any officers conducted any specific searches and seizures in accordance with any policy or directive promulgated by Chief Coughlin. Rather, Petitioner attempted to extrapolate a custom of impermissible seizures that she alleges occur in each and every search conducted by the Wichita Falls Police Department solely from a few general statements given by Coughlin and other officers in depositions.

From deposition testimony of three officers, including Chief Coughlin, counsel for Plaintiff selected partial passages to construct a supposedly unconstitutional general approach to seizure by Wichita Falls Police Officers. Notably, the passages do not reference any specific incidents other than Zarnow. There is no evidence of numerous reports showing other claimed warrantless seizures or complaints by other citizens of any illegal seizures. Zarnow broadly claims that warrantless seizures must occur because all officers always seize everything using a "flawed plain view" doctrine. No such proof exists in this case. Zarnow did not sustain her initial burden to properly support her motion with evidence as to municipal custom. The only incidents referenced by Petitioner involved Zarnow.

Monell's requirement that municipal liability be premised on a custom or policy has consistently been followed to avoid the collapse of constitutional responsibility concepts into the *respondeat superior* framework. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Bd of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Petitioner's entire theory of the supposed existence of a municipal custom wrapped around the individual decision of "what to seize when" which is a case-by-case analysis made by an officer based on probable cause from the totality of the circumstances and training known to the officers at the time of the alleged seizure. Rejecting arguments of the nature made by Petitioner, the case law continually upholds *Monell's* required involvement of *municipal* action. Petitioner's attempts to make her municipal claim from individual conduct failed in the district court and on appeal to the Fifth Circuit.

Both Courts implicitly recognized that a finding that such testimony constituted in and of itself "custom evidence" would collapse municipal liability into nothing more than *respondeat superior* liability.

Petitioner's so called "custom testimony" misrepresents the statements contained in the record. Petitioner continues to try and perpetuate an "urban myth" in this case that an unconstitutional seizure occurs in every search. Although the myth began in Petitioner's early briefing and motions, it finds no true support in the actual record or in the actual testimony given by the officers.

During the course of deposing the Chief, Plaintiff's counsel asked for his explanation of the "plain view doctrine." The Chief stated in response:

> "Well, basically, if in the course or scope of an officer's duties they come across something that's sitting out in the open that would not – you know, would be obviously, say, something of a contraband nature or of an evidentiary nature or something of a particular crime, that's generally accepted that you don't – you can look at it and seize it if it's something that's there in plain view."

(PET. BRIEF 21)

Petitioner contends that these seven lines of deposition testimony constitute an unconstitutional policy by the City to direct the seizure of everything. The recitation is nothing but a personal paraphrasing of case law doctrine. To claim that this language establishes a policy that

directs officers to "seize everything" completely ignores that the specific language used in the Chief's answer which included a requirement that the item be "of a contraband nature" or evidence of a "particular crime." Arguing that this testimony supports a finding of unconstitutional "custom" (a widespread persistent pattern of conduct) when it is not connected to any specific incident, much less to a significant number of events, and it is not an instruction given to any particular officer at any particular time, simply stretches too far to meet the threshold of the first element required for a municipal custom.

This isolated passage is not evidence of any widespread persistent pattern of unconstitutional conduct that was (i) employed by the Chief on any specific occasion, (ii) regularly employed by other police officers in other instances, or (iii) representative of any instruction given to any police officers. It is one partial answer taken out of context and twisted by Petitioner to fill the void left by the total absence of any pattern of other alleged unconstitutional seizures by City police officers.

Petitioner also points to other snippets of the Chief's testimony where the Chief generally discusses his opinions concerning why certain evidence might be seized at a search. (PET. BRIEF 21-22). Nothing stated by the Chief in the context of the questions and answers supports that there is a general policy of seizing things without proper authority. In fact, the Chief references the authority relied upon in collecting items as specifically involving a court's authority to collect evidence with a warrant not a warrantless search or seizure situation.[3] (PET. BRIEF 22)

---

3. R. 2846-47.

Although Petitioner attempts to take liberties with describing the testimony of Chief Coughlin, there is no evidence or testimony that Coughlin ever told, directed, or otherwise communicated to officers to seize Zarnow's property in contravention of the constraints of the "plain view" doctrine. Nor was there evidence presented that Coughlin ever espoused a policy, practice or required procedure for directing, or otherwise allowing the seizure of property not consistent with the "plain view" doctrine or any other applicable search and seizure laws. Petitioner cannot point to any testimony by Coughlin that the Police Department always seized items outside the scope of warrants or that it was the practice of the Police Department to "seize anything and everything" or the practice to "seize items and ask questions later." Coughlin never made such statements.

Petitioner attempts to bolster her custom argument and the statements of the Chief with general statements from two of the several original officers sued in this action. The actual statements of each officer regarding the plain view doctrine do not support the myth circulated by Petitioner's filings that an unconstitutional seizure occurs in every search conducted. Petitioner did not offer evidence of even one other incident of an unconstitutional warrantless seizure that occurred prior to Zarnow's seizures. She argues that because of the years of experience that the three officers possessed, this presents uncontroverted evidence of an unconstitutional custom. Petitioner cites deposition testimony as evidence that officers Dilbeck and Kendall could fairly be said to be familiar with Wichita Falls custom and common practice. (PET. BRIEF 21-23). These cited pages state nothing about any custom or practice, much less a specific custom or

practice of warrantless seizure. All of these references merely relate to the officer's length of service to the citizens of Wichita Falls.

Petitioner's supporting references make it clear that her position is – if an officer with this much experience did it, it must be the City's policy. This approach is nothing more than a "*respondeat superior*" argument in different clothing – an approach the courts have rejected since 1978. *Monell*, 436 U.S. at 694; *Bd of Comm'rs of Bryan County v. Brown*, 520 U.S. at 403; *City of Canton v. Harris*, 489 U.S. at 388; *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998), and reh'g denied, 149 F.3d 1181, cert. denied 526 U.S. 1083; *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) (*en banc*).

Petitioner's valiant attempt to weave isolated deposition statements into pattern evidence of a widespread unconstitutional custom of the City seems a last futile effort to persuade this Court to ignore its own precedent. There is no evidence relating to an alleged unconstitutional seizure of property custom by the Wichita Falls Police Department, and no evidence of any incident other than the property seizure in the Zarnow case. Petitioner is asking this Court to find that the Fifth Circuit erred in finding that there was no genuine issue of a material fact as to a widespread and well-established City practice of seizing property without probable cause without any evidence of another instance in which a "warrantless seizure" was made. There was no evidence of a pattern of similar incidents injuring or endangering citizens. Supreme Court precedent mandates Plaintiff's "custom and practice" argument be rejected.

Only if Zarnow showed that his injury resulted from a "permanent and well settled" practice may liability attach for injury resulting from a custom of the City. *City of St. Louis v. Praprotnik*, 485 U.S.112, 127 (1988); *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970).

Petitioner asks that this Court "hold this petition pending a decision in *Connick*." This Court recently decided the *Connick* case in which it reaffirmed the requirement that a pattern of similar constitutional violations is ordinarily required to show an informal policy or custom. *Connick v. Thompson*, 131 S.Ct. at 1360-61. Petitioner has no such evidence and never presented any such evidence to the district court or to the Court of Appeals. Although *Connick* was a "failure to train" case, we agree with Petitioner that the "principles and the application of those principles are substantially similar" at least with regard to the requirement that a custom requires proof of a well-accepted, widespread practice that has been implemented in other similar situations. (PET. BRIEF 32).

Petitioner's attempt to argue that a "custom" need not be proved by evidence of other occurrences lacks all credibility in light of established municipal liability jurisprudence. Without proof of a recurring pattern, a claim based upon customary policy must fail. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) r'hng. denied, 735 F.2d 861, cert. denied, 472 U.S. 1016 (1985). It is clear that individual acts of officers in isolated incidents are not sufficient to bind the municipality unless they are accompanied by proof of persistent, widespread practices of objectionable conduct *predating* the involved incident so as to provide some basis for municipal responsibility.

Petitioner never presented any other evidence involving any objectionable conduct predating the Zarnow searches. Without such evidence, Petitioner's claim of a City custom must fail as custom requires more than the searches and seizures at issue.

IV. RULE 15(3) PERCEIVED MISSTATEMENT OF FACT OR LAW.

Throughout this Response, Petitioner's misstatements of fact and law have been referenced and pointed out by Respondents. Respondents request that this Court deny review because Petitioner relies on misrepresentations of both the procedural/factual background and the existence of a substantive conflict in the case authorities.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

D. D'Lyn Davison
Counsel of Record
Davison Rugeley, L.L.P.
900 Eighth Street, Suite 1102
Wichita Falls, Texas 76307-0099
(940) 766-1388
dlyndavison@sbcglobal.net

JULIA M. VASQUEZ
CITY OF WICHITA FALLS
1300 7th Street
Wichita Falls, Texas 76301
(940) 761-7625

Counsel for Respondents

May 23, 2011